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IN THE

Supreme Court of the United States

October Term, 1940

No. 402

GUY A. THOMPSON, TRUSTEE FOR THE MISSOURI PACIFIC RAILROAD COMPANY ..... *Petitioner,*

v.

NEAL WILEY ..... *Respondent.*

BRIEF AND ARGUMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF RESPONDENT

We feel it proper to call attention to some of the glaring misstatements contained in petitioner's "Summary Statement of Case," beginning his brief (P. 2). At the outset it is stated by petitioner, his brief (P. 4): "As shown by the record, the first suggestion that he (respondent) was struck by a lump of coal was when he filed an amendment to his complaint March 3, 1939. Numerous witnesses testified that they had talked to the respondent (plaintiff) and that at all times he disclaimed any knowledge as to how he was injured." How petitioner can make this statement in the light of the record is beyond our conception. True, there was an amendment filed to the

complaint on March 3, 1939, but such amendment in no wise materially changed the allegations of negligence but set them out with more particularity, especially in reference to the conduct and action of petitioner's bridge superintendent, McLendon, in his instructions and directions to respondent as to his duties and the manner in which he was to perform his work.

The original complaint of respondent was filed in the Crawford Circuit Court on December 5, 1938, and appears R. 1-4. Among other allegations appearing in that complaint are the following:

> "That plaintiff's injuries and damages were caused and occasioned by the carelessness and negligence of the defendant, his servants, agents and employees, whose names are unknown to the plaintiff but well known to the defendant, in that said employees of the defendant carelessly and negligently placed and stacked and loaded and permitted and caused to be placed, stacked and loaded large and heavy pieces of coal, slate and debris in such manner on said car as to cause same to be loose, insecure, dangerous and unsafe, and carelessly and negligently loaded and overloaded said car and caused and permitted same to be carelessly and negligently loaded and overloaded so that a large and heavy piece of said coal, slate and debris would in the operation of said train fall therefrom, and carelessly and negligently failed to exercise ordinary and reasonable care to make reasonable inspection of said car and the load thereon to determine whether or not same was reasonably safe for transportation and whether or not same was properly loaded,"

and further alleged negligence in the operation of the train over this particular track where the slow orders were admittedly in effect; and continues with the allegations that:

> "said employees carelessly and negligently so operated said train as to cause a sudden, unusual and violent jerk and lurch of said train and of said car at said point, thereby causing and contributing to causing said piece of coal, slate and debris to be dislodged and to fall as aforesaid, which said acts of negligence, operating both singly and together, produced and brought about plaintiff's injuries."

This certainly disposes of petitioner's remarkable contention. It is conclusively demonstrated that, contrary to the flat statement that the first suggestion of his being struck by a lump of coal was in respondent's amended complaint, that he alleged in his original complaint in detail the loading of the coal car or tender, the negligent operation of the train, and the consequent falling of "a large and heavy piece of said coal, slate and debris."

Also, the statement above of petitioner in reference to "numerous witnesses" testifying that they had talked to respondent and that he at all times disclaimed any knowledge as to how he was injured, is likewise a gross misstatement of the facts as disclosed by the record. Petitioner fails to call attention as to where in the record the testimony of these "numerous witnesses" may be found. It does not appear. The nearest approach to it is a statement taken from respondent in a hospital in the city of Little Rock, some three weeks after his injury, by a claim representative of petitioner, and the testimony in reference to this statement upon behalf of respondent is that he knew nothing about the preparation of the statement or its contents, and had no recollection whatever in connection with it. His testimony in this respect is thoroughly borne out by the medical testimony as to his condition at that

time and his inability to realize the effect of any statement made by reason of the admitted terrible injury which he had suffered to his head, and it is significant that although, as shown by the record, during the year preceding the bringing of the suit respondent spent most of his time in at least three hospitals operated by petitioner, and was in one at the very time the alleged statement is said to have been made, and yet no physician of petitioner was placed upon the witness stand to deny or explain his physical and mental condition at the time of the alleged statement. In any event, of course, these matters were all questions of fact to be determined by the triers of fact, but at the same time petitioner should be more careful of statements in reference to the record.

Another misstatement contained in petitioner's alleged "Reasons Relied on For the Allowance of the Writ," appears in connection with his discussion of the question of liability by the Arkansas Supreme Court and as to negligence in connection with the improper loading of coal on coal tenders. Petitioner calls attention, his brief P. 10, to the statement of the Arkansas Supreme Court that "The negligence established in the cited case is not different in kind or degree from that proven by appellee," and it continues with the statement, "To support that statement two cases from Arkansas are cited in which the Supreme Court held that under the presumption of negligence statute in Arkansas that the plaintiffs were entitled to recover."

It is obvious from the opinion of the Supreme Court of Arkansas in the case at bar, which opinion, not officially reported, appears 140 S. W. (2d) 676, and is contained in full in R. 179, that the court made no reference

to either of these cases upon any question of the method or manner of proof, but said in referring to them only the thing that must be admitted, that "the negligence established" in these particular cases "is not different in kind or degree from that proven by appellee." The Supreme Court of Arkansas had already set out at great length the method in which this particular negligence had been proven by the respondent here. Among other things, the court said in its opinion:

> "* * * Counsel for both the appellant and the appellee have proceeded upon the theory that the case was one arising under the Federal Employers' Liability Act and that there can be no recovery unless there was proof of a substantial nature establishing negligence on (fol. 326) the part of the defendant, the appellant here, and it is not contended on the part of the appellee that he is entitled to any presumption of negligence arising out of the fact that he was injured by the running or operation of the train."

It was not so contended by the respondent, and the case was tried throughout upon the theory that the burden was upon him to establish negligence by the testimony. This was very clearly and definitely recognized by the Supreme Court of Arkansas. That respondent did prove negligence both in the loading of the tender, which proof was practically undisputed, and in the negligent operation of the train under the circumstances, is disclosed by the record. The Supreme Court of Arkansas in the course of its opinion merely stated that such established negligence was of the same character as that in the two cited cases, which cases, as to negligence, announced principles of law long recognized by this and other courts.

As to the Armbrust case referred to, the Supreme Court of Arkansas did not hold that the plaintiff in that case was entitled to recover under any "presumption of negligence statute in Arkansas." On the contrary, it held that the doctrine of *res ipsa loquitur* applied, and at the same time referred to proof which showed negligence upon the part of the defendant, saying among other things:

> "The plaintiff testified that he saw the tender before the flying object left it and stated that it looked to him as if the tender was overloaded with coal and that he noticed a big pile of coal on the top of it."

The court went on to discuss other testimony in the case as to the loading of the tender and the operation of the train, and held that:

> "* * * Under the circumstances surrounding the accident, the jury might have found that the defendant's witnesses were mistaken in saying that the tender was properly loaded on the day in question; or they might have found that a lump of coal was allowed to fall off because of the careless handling of it by the fireman."

It is readily apparent that the only reference to these cases made by the Supreme Court of Arkansas was that the negligence established was of a similar character, and that such reference had no applicability whatever to the method of proof in establishing the acts of negligence.

Throughout the opinion in this case it is stated very clearly that no presumption of negligence was available, that not even the doctrine of *res ipsa loquitur* was given any effect, but that the burden was upon the respondent to establish such similar acts of negligence by substantial

evidence in the case. That he did so is disclosed by the record, and that petitioner's statement in this connection is clearly erroneous must be obvious.

These misstatements of petitioner as to the record occur so frequently and with such persistency that it would create a trespass upon the time of the court to undertake calling attention to all of them. We at this point mention one other, which is a repetition of one previously made in petitioner's brief. We refer to the statement made, petitioner's brief P. 15, as follows: "As suggested, the accident occurred October 13, 1937. Suit was not filed until December 5, 1938, and the allegation as to negligence upon which the case was tried was not alleged in the original complaint but in the amended complaint filed March 2, 1939. The defendant specifically plead as a defense assumed risk and this defense was apparently totally ignored by the Court as it is not mentioned in its opinion." We have already shown emphatically and the record discloses unquestionably that "the allegation as to negligence upon which the case was tried" *was* alleged in the original complaint, filed on December 5, 1938. There is no showing anywhere that the court ignored any defense of assumed risk upon the part of petitioner. The question of assumed risk was submitted to the trial jury under numerous instructions. If there was any error in this connection it was in submitting the issue at all, because a reference to the record discloses that there was no substantial evidence upon which to base this contention. The Supreme Court of Arkansas in its opinion and consideration of the case evidently considered that question. The statement of the case, as shown by the opinion and as disclosed by the tes-

timony, establishes that at the very most the issue was one of fact, submitted under instructions not complained of, and determined by the jury. In reference to this statement contained by petitioner in its brief (P. 15), we might well call attention to the fact that, contrary to his statement, so far as the amended complaint which he says is the one that alleged the act of negligence upon which the case was tried, he did not at any time by answer or proper plea even so much as plead "as a defense assumed risk."

As stated, the original complaint was filed on December 5, 1938. Petitioner filed answer to the original complaint on March 2, 1939, in which the defense of assumption of risk was plead (R. 5). It is further disclosed that on March 3, 1939, such amendment was filed (R. 6). On March 13, 1939, ten days after the filing of this amendment, petitioner filed "Answer to Amended Complaint" (R. 7). All that was stated in this answer is, "That he denies each and every material allegation in said amended complaint set out and contained." There is not the slightest reference to assumption of risk, which is an affirmative defense and, under the law of procedure both in the State of Arkansas and in the Federal courts, must be affirmatively plead, as we shall show.

Notwithstanding this, however, every instruction requested by petitioner on the issue of assumed risk was given by the trial court, and he made no request to the trial court to declare that respondent was guilty of assumed risk as a matter of law, but evidently realized throughout that at most it was a question of fact. Neither is any such question raised in petitioner's motion for new trial (R. 10).

It surely is unnecessary to make reference as to statements contained in petitioner's brief as to matters contended to have been raised in briefs and in oral argument which are not apparent of record.

ARGUMENT

Petitioner begins his argument with the statement to the effect that the decision of the Supreme Court of Arkansas is of great importance to petitioner, not only in this case but in others which may arise and be determined. He does not, however, go to the extreme of seriously insisting that the State court in this instance "has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Nothing in his argument or presented in the record would indicate any such situation.

POINT I

The contention that the Supreme Court of Arkansas erred in applying as controlling decisions of the Supreme Court of Arkansas based on the Arkansas presumption of negligence statute in this case brought under the Federal Employers' Liability Act.

As we have already shown in our statement, the statement contained in the first paragraph of petitioner's brief on this point (P. 15), to the effect that the act of negligence upon which the case was tried was not alleged until the filing of the amended complaint, is absolutely incorrect.

It would seem that nothing further need be said beyond the reference in our statement as to the remarkable contention that the decision of the Supreme Court of Arkansas in the case at bar is based upon the presumption of negligence statute in Arkansas. As we have already shown, the reference in the opinion as to these cases was as to

the character of negligence and not the method of proof. Reference in the opinion is only made, as is obvious, to the cases of *St. L. I. M. & S. R. Co.* v. *Armbrust,* 121 Ark. 351, and to *St. L. S. F. R. Co.* v. *Carr,* 94 Ark. 246, for the purpose of showing that, as according to the uniform weight of authority, the careless or improper loading of coal on a tender or car, as well as the negligent operation of the train so loaded, constitutes negligence. We have already called attention to what was said in the Armbrust case in reference to this proposition.

In the Carr case, the Supreme Court of Arkansas said:

> "A railroad company is bound to use ordinary care and caution to avoid injuring persons who may be near its tracks, and who are rightfully at such place; and whether or not under all the circumstances of the case the railroad company was negligent in permitting any object or article which caused the injury to project or fall from its train of cars is a question of fact for the jury to determine."

Surely there can be no quarrel with this definition of elementary law.

Cases cited as to facts making out a *prima facie* case by petitioner have no application whatever. The Supreme Court of Arkansas in the case at bar made it very clear that there was no presumption of negligence "and that there can be no recovery unless there was proof of a substantial nature establishing negligence on the part of the defendant." That was the whole basis of the decision, as shown throughout the opinion, and that is the rule in Arkansas and in this court under the Federal Employers' Liability Act.

After the reference to the Armbrust and Carr cases, *supra,* the Arkansas Supreme Court said:

> "Furthermore, if we give to appellee's evidence that consideration favorable to sustain the verdict and judgment we must reach the conclusion there was other and additional negligence in the operation of the train. He may rightly invoke this rule."

The opinion deals at length with the evidence, and speaks for itself that it is in complete conformity with all the decisions of this court upon the subject.

POINT II.

The contention that the Supreme Court of Arkansas erred in ignoring the defense of assumed risk.

Under this head it is stated: "The petitioner herein, defendant in the trial court, specifically pleaded as a defense assumed risk. He asked for instructions on the doctrine of assumed risk." As we have previously shown, as to the amended complaint which he contends contained the only allegation of negligence upon which the cause was submitted to the jury, he did not in any way plead as a defense assumption of risk (R. 7). Under the rules and law of procedure of the State of Arkansas, such defense is an affirmative one and must be specifically plead.

As was said in the case of *Clark Lumber Co.* v. *Johns,* 98 Ark. 211-214:

> "Assumption of risk by the plaintiff, being based on an implied contract, was a matter of defense to be pleaded by the defendant."

However, notwithstanding this failure upon the part of the petitioner, and notwithstanding its failure of proof upon

this proposition, the issue was at its request submitted to the jury in repeated instructions, as follows: Instruction No. 6 (R. 175); Instruction No. 7 (R. 175); Instruction No. 10 (R. 176); Instruction No. 11 (R. 176). As we have previously shown, no instruction was requested to the effect that respondent was guilty of assumption of risk as a matter of law, and no such contention made in the record.

In response to petitioner's statement that "The plaintiff in this case testified that he was standing within seven or eight feet of the train as it passed," we call attention to the uncontradicted testimony that he was standing where he had been ordered and directed to stand by petitioner's bridge superintendent, McLendon; that he was where he necessarily had to be to perform the duties of his employment; that he was as far away from the track as was possible without getting down into a ditch some twenty feet in depth, where the performance of his duties would have been absolutely impossible, and to the further fact that in the absence of negligence the position where he was standing and required to be would have been a place of absolute safety (R. 25-26-27).

POINT III.

The contention that the Supreme Court of Arkansas erred in refusing to apply the law of assumed risk as declared by this court.

It would seem that this is practically the same contention made by petitioner under a previous heading. As we have already shown, the Supreme Court of Arkansas did not in any wise refuse to apply the law of assumed risk. In addition to that, it does not appear that the argument

sought to be made by petitioner under its "Point III," its brief pp. 18-20, is based upon the question of assumption of risk, but it is more in the nature of an argument as to the weight of the evidence.

It has never been questioned that at the time of the occurrence of this injury the rule of assumption of risk was in effect, as stated by petitioner. In cases arising under the Federal Employers' Liability Act, such defense has since been completely abolished, "Acts of 76th Congress, approved August 11, 1939, amending Sections 51 and 54, 45 U. S. C. A." It is not insisted, however, that this act is retroactive, but it is insisted that the law as in effect at the time of the injury was applied by the courts of Arkansas even though not properly plead by petitioner.

In the recent case of *Great Northern Ry. Co.* v. *Leonidas,* 305 U. S. 1, this court had before it a case where the Supreme Court of Montana had erroneously held that under the law then in effect assumption of risk was not available as a defense in a case under the Employers' Liability Act. This court, while holding that such a declaration of law was erroneous, at the same time said:

> "Despite this erroneous ruling, we are of the opinion that the judgment should be affirmed upon the first ground taken by the state court, that is, that the question of assumption of risk was for the jury. It is not contended that the instructions of the trial court upon that defense were erroneous. The contention is that there was no evidence to go to the jury. We think that there was."

It is unnecessary to discuss the argument under this heading advanced by petitioner as to evidence in reference to the negligent or improper loading of the tender. These

matters, as shown by the record and the decision of the Supreme Court of Arkansas, were disputed questions of fact. A reference to the record discloses that while there was positive testimony on the part of the respondent as to the coal being stacked up beyond the edge of the tender and it coming from the tender and striking him when the speed of the train was checked suddenly and violently, the evidence on behalf of petitioner undertaking to contradict this was very uncertain and unsatisfactory indeed.

Petitioner at this point, in discussing the opinion of the Supreme Court of Arkansas, makes the very obviously erroneous statement that, "The only evidence tending to establish 'that the rock found at or very near the place of the accident was slate-like or the kind sometimes found in coal' is found in the testimony of Will Wiley, father of the respondent," and that this is in reference to a statement of McLendon, the assistant bridge superintendent, as to what he found. Petitioner is markedly in error in this statement. There was much evidence from his own employees tending to show this situation. It was admitted by all of them that there was a rock found near where respondent was found in an unconscious condition by the other employees hours after the injury. These employees differed to some extent in the description of this object, both as to its color, its shape and its size, but it is obvious from the testimony of all of them that they turned instinctively to this object as being the cause of the injury. The description of it, made by a number of such employees, completely bears out the statement that it was such a stone or rock that is sometimes found in coal, that it was "slate-like."

McLendon, the bridge superintendent, testified in reference to it: "It was dark colored" (R. 100).

Mike Moore, petitioner's assistant bridge foreman at the time, described it as follows: "No, sir, it was not a black rock, my recollection was that it was dark blue, kind of brown" (R. 105).

Petitioner's "inspector of bridges" described it as "dark blue" (R. 109-110).

Numerous other employees variously described this object. They differed to some extent as to its color particularly, but certainly this testimony from his own employees is amply sufficient to refute petitioner's criticism of the declaration of the Supreme Court of Arkansas in reference to the color or appearance of this object, which very significantly was not preserved by these representatives of petitioner.

POINT IV.

The contention that the Supreme Court of Arkansas erred in holding that the evidence was sufficient to sustain the judgment of the trial court.

Finally, under this heading it is contended by petitioner that the Supreme Court of Arkansas in its opinion was in error in holding that there was sufficient substantial testimony to warrant the submission of the issue of negligence to the jury. In urging this view, petitioner principally relies upon the contention that respondent's testimony at the trial varied in some particular with a written statement purported to have been signed by him three weeks after the injury, while he was in petitioner's

hospital under the treatment of his physicians, a statement which respondent testified he had no knowledge of making, which the medical testimony showed in the case that he in all probability would not know about making, and which testimony was not denied by any of petitioner's physicians at his hospital in Little Rock; and upon the further proposition of the bald statement that the testimony "is contrary to the law of gravitation," without any suggestion whatever of wherein such a state of facts conflicts in any way with the law of gravitation.

The undisputed evidence shows that the train was going around the curve at the time it is claimed its speed was suddenly and violently checked with a violent and unusual jerk. Anyone would know that the direction in which an object such as this might go, and where it might finally rest would depend upon all of these conditions as well as upon its particular situation in reference to other objects on the tender or car. These were, of course, all matters for the determination of the jury, and nothing about the situation whatever is contradicted by physical facts. The Supreme Court of Arkansas applied in this case exactly the same rule as it has in other cases, and as this court has recognized in all cases governed by the Federal Employers' Liability Act, and that is the common-law rule of evidence as interpreted by the Federal courts.

Petitioner cites authorities holding that the scintilla rule of evidence does not apply in the Federal court. Neither does it apply nor has it ever applied in the Supreme Court of Arkansas.

In the case of *Metropolitan Life Ins. Co.* v. *Gregory*, 188 Ark. 516-520, the Supreme Court of Arkansas said:

"* * * This court has not adopted the scintilla of evidence rule."

In the case of *Osborne* v. *Hittson,* 118 Ark. 349-352, the Supreme Court of Arkansas said:

"* * * We have never adopted the scintilla rule in this State; on the contrary, we have uniformly held that to uphold a verdict on appeal, there must be some substantial evidence to support it."

In the case of *Mo. Pac. R. Co.* v. *Remel,* 185 Ark. 598, in which certiorari was denied by this court, the Arkansas Court again said in reference to an action under the Federal Employers' Liability Act:

"In an action under this chapter, verdicts supported only by scintilla of evidence will not be sustained."

It was further said in that case:

"In an action under this section neither state nor federal court will sustain verdict based on speculation and conjecture."

Many other cases to the same effect might be cited, but we think it apparent that the rule as often announced in Arkansas, and as particularly applied in the case at bar, is exactly the same as that recognized by this court.

In the case of *Gunning* v. *Cooley,* 281 U. S. 90, this court said:

"Issues that depend on the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should

be drawn in favor of the latter all the inferences that fairly are deducible from them. *Texas & Pacific Ry. Co.* v. *Cox,* 145 U. S. 593, 606, 12 S. Ct. 905, 36 L. Ed. 829; *Gardner* v. *Michigan Central Railroad,* 150 U. S. 349, 360, 14 S. Ct. 140, 37 L. Ed. 1107; *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521, 524, 527, 45 S. Ct. 169, 69 L. Ed. 419. Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

In the case of *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U. S. 555, this court said:

"* * * And the finding of the jury upon that question must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts." (Citing cases.)

In the case of *Seaboard Air Line Railway* v. *Koennecke,* 239 U. S. 352, as to questions under the Employers' Liability Act, this court said:

"Next it is urged that there was no evidence that the deceased was employed in interstate commerce. Upon such matters, as upon questions of negligence and the like, brought here only because arising in actions on the statute, and involving no new principle, we confine ourselves to a summary statement of results."

In the case of *Louisville & N. R. Co.* v. *Stewart as Administratrix,* 241 U. S. 261, another case under the Employers' Liability Act, this court made the following observation:

"The railroad company contends at some length that the case should have been taken from the jury by the direction of a verdict in its favor. As the opinion

of both courts below and the jury were against it, and as we agree with their judgment, we shall not discuss this assignment of error at length. *Great Northern R. Co.* v. *Knapp*, 240 U. S. 464, 466, 60 L. Ed. ....., 36 Sup. Ct. Rep. 399."

We submit that the opinion of the Supreme Court of Arkansas in this case is in entire accord with the foregoing and many other decisions of this court upon the question of substantial testimony and the weight and determination of the sufficiency thereof. The Supreme Court of Arkansas applied to the facts in this case the rule announced by this court. It held that there must be substantial testimony establishing negligence. Finding the testimony "in sharp dispute," it said in reference to the testimony on the part of respondent:

> "* * * Such evidence was substantial—positive—not at all impossible or even improbable, though for the most part contradicted. It was, under such circumstances, the function of the jury to settle or determine which theory was true, and having decided these matters for appellee we may not as a proposition of law declare there was error in so deciding."

It would seem unnecessary to say that this declaration of law as applied to the facts is in keeping with the repeated holdings of this court under similar circumstances.

We might well call attention to many cases where judgments have been sustained involving facts similar to those disclosed in this record. We content ourselves, however, with a reference to only a few of those as made by the Supreme Court of Arkansas in the following quotation from its opinion:

> "It hardly seems necessary to do so, but we now cite some authorities from other jurisdictions in the

determination of similar facts to these we are considering. *Menafee* v. *Monongahela Ry. Co.*, 148 S. E. 109 (W. Va.); *Cincinnati N. O. & T. P. Ry. Co.* v. *Claybourne's Admr.*, 183 S. W. 903 (Ky.); *L. & N. R. R. Co.* v. *Clark*, 106 S. W. 1184 (Ky.); *Yazoo & M. V. R. Co.* v. *McCaskell*, 79 So. 811 (Miss.).

"All these present facts which are not dissimilar from those in the instant case and some of them arose and were tried under the Federal Employers' Liability Act. In them will be found ample authority to declare negligence on account of improper loading of a car or tender, or from improper handling or operation of trains."

We submit that the writ should be denied.

Respectfully submitted,

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END OF A CASE